# STATE PERSONNEL BOARD, STATE OF COLORADO

Case No. 2000B144

### INITIAL DECISION OF THE ADMINISTRATIVE LAW JUDGE

RICK I. PROTTSMAN,

Complainant,

VS.

DEPARTMENT OF HIGHER EDUCATION,
STATE BOARD FOR COMMUNITY COLLEGES AND OCCUPATIONAL EDUCATION,
NORTHEASTERN JUNIOR COLLEGE,

Respondent.

Hearing was held before Administrative Law Judge Robert W. Thompson, Jr. on June 20, 2000. Respondent was represented by Coleman M. Connolly, Assistant Attorney General. Complainant represented himself.

Complainant=s sole evidence consisted of his own testimony. Due to the disposition of this case, respondent did not call any witnesses. Respondent=s Exhibits 1 and 2 were entered into evidence without objection.

### MATTER APPEALED

Complainant appeals the administrative termination of his employment due to his exhaustion of leave and inability to work, alleging that respondent=s action was premature. For the reasons set forth below, respondent=s action is affirmed.

### **ISSUE**

Whether respondent=s action was arbitrary, capricious or contrary to rule or law.

### FINDINGS OF FACT

- 1. Complainant Rick I. Prottsman began employment as a journeyman electrician with respondent Northeastern Junior College in February 1998. He was the only electrician at the college, located in Sterling. To obtain a Colorado journeyman electrician=s license, as Prottsman had, requires four years of experience working under a master electrician.
- 2. Prottsman=s responsibilities required the use of ladders, pulling wire and working with overhead fixtures.
- 3. The other trades people at the college, such as plumbers or carpenters, were not qualified to perform an electrician=s work.
- 4. On June 8, 1999, Prottsman suffered a hair-line fracture of his right hip when he fell off a ladder.
- 5. The initial diagnosis did not include the need for surgery. Eventually, after three or four months, it was determined that Prottsman needed a full hip replacement, which was done on March 2, 2000.
- 6. During this time period, Prottsman exhausted all available leave, inclusive of injury leave, annual and sick leave, short-term disability and family and medical leave.

- 7. Early in 2000, Prottsman received a medical release to work up to five hours per day with job modifications. However, he found himself unable to work because of the pain, so he stopped work altogether.
- 8. Prottsman stayed in touch with the appropriate college personnel regarding his work status. Following the March 2 hip replacement, the facilities plant manager and the human resources officer traveled to Prottsman=s home in Holyoke to discuss his job status and work plans. Prottsman believed that it was just a matter of time until he improved sufficiently to be able to perform his job. Meanwhile, he remained on LWOP while receiving worker=s compensation benefits.
- 9. In late April 2000, Prottsman gave the plant manager a physician=s report indicating that he could work no more than two hours per day and could not lift over five pounds, could not twist, bend or squat, and could not push or pull over five pounds. (Ex. 2.) There was no date set as to when he would be able to work without these time and job restrictions. At the time of hearing, there still was no such date. He is presently undergoing physical therapy and is being compensated through worker=s compensation.
- 10. It is not possible to perform the duties of electrician for the college without working beyond Prottsman=s work restrictions.
- 11. Together, after so informing Prottsman, the plant manager and the human resources officer recommended to the college president that Prottsman=s position remain vacant no longer, advising him that the position could not be filled as long as the incumbent was

on LWOP status.

12. By letter dated May 2, 2000, President Bruce C, Perryman administratively terminated Prottsman=s employment effective May 5 in the following manner:

This office has received information from your physician indicating that at this time, you are unable to perform the essential functions of your position as electrician. Because you are unable to perform the essential functions of the position with or without accommodation, and all eligible leave benefits have been exhausted, it is my decision to terminate your employment with Northeastern Junior College effective May 5, 2000. In consultation with your supervisor, it is felt that the continued vacancy of this position would cause an undue hardship on Northeastern Junior College. (Ex. 2.)

13. Complainant Rick I. Prottsman filed a timely appeal of the administrative decision on May 9, 2000, alleging that the decision was made prematurely.

#### DISCUSSION

In an appeal of an administrative action, unlike a disciplinary proceeding, the complainant bears the burden of going forward with the evidence and proving by a preponderance of the evidence that the action of the respondent was arbitrary, capricious or contrary to rule or law. Renteria v. Department of Personnel, 811 P.2d 797 (Colo. 1991). See also Department of Institutions v. Kinchen, 886 P.2d 700 (Colo. 1994). The Board may reverse respondent=s decision only if the action is found arbitrary, capricious or contrary to rule or law.  $\mathfrak{I}$  24-50-103(6), C.R.S. It is for the administrative law judge, as the fact finder, to determine the persuasive effect of the evidence and whether the burden of proof has been satisfied.

Metro Moving and Storage Co. v. Gussert, 914 P.2d 411 (Colo. App. 1995).

At the close of complainant=s case-in-chief, respondent moved for judgment in its favor on grounds that complainant had proffered insufficient evidence to make a prima facie showing that respondent=s action was arbitrary, capricious or contrary to rule or law. Respondent argued that the appointing authority acted within his discretion when he terminated complainant=s employment for exhaustion of leave and continued inability to perform his job duties, relying on Director=s Procedure P-5-10. In this instance, respondent argued, there was no need for respondent to go forward.

Complainant answered respondent=s motion for judgment by asserting that if his injury had initially been properly diagnosed, then he could have had surgery sooner and consequently improved sooner so he could return to work, which is not his fault. Additionally, he argued, the college could have hired part-time help during the summer or contracted out for the work that needed to be done.

Respondent=s motion for judgment was granted.

Motions for a directed verdict (judgment) present a question of law. Grossard v. Watson, 221 P.2d 353 (Colo. 1950). See C.R.C.P. 50(a); 3 24-4-105(4), C.R.S. The evidence must be viewed in the light most favorable to the nonmoving party. Singer v. Chitwood, 247 P.2d 905 (Colo. 1952). It is the duty of the trial court (administrative law judge) to grant the motion when the evidence establishes that there is no issue upon which the nonmoving party could prevail as a matter of law. Montes v. Hyland Hills Park, 849 P.2d 852 (Colo. 1992).

A motion for a directed verdict can only be granted when the evidence, considered in the light most favorable to the nonmoving party, compels the conclusion that a reasonable jury could not find in favor of the nonmoving party. *McGlasson v. Bargar*, 431 P.2d 778, 779 (Colo. 1967); accord, e.g., Smith v. City & County of Denver, 726 P.2d 1125, 1128 (Colo. 1986).

Procedure P-5-10, 4 Code Colo. Reg. 801, provides in pertinent part:

If an employee has exhausted all sick leave and is unable to return to work, accrued annual leave will be used. If annual leave is exhausted, leave-without-pay may be granted or the employee may be administratively discharged by written notice after pre-termination communication...

The appointing authority fully complied with the requirements of P-5-10, including pre-termination communication with the employee. He was not responsible for any deficiencies there may have been in complainant=s medical treatment. Complainant had exhausted all forms of leave available to him, and he was still unable to work. The appointing authority was faced with a situation where the date upon which the employee could return to work was indeterminable. He was not required to continue complainant in LWOP status indefinitely. Nor was he required to budget for part-time help or independent contractors for as long as it took for complainant to recover. What complainant=s recovery period might have been under other circumstances is purely speculative.

The appointing authority reasonably concluded that the continued absence of the college=s only electrician, after eleven months, posed an undue hardship for the college. He was not required to do

more than he did. There was no showing by complainant that the appointing authority abused his discretion.

The issue of permanent disability was not present in this case.

# CONCLUSIONS OF LAW

Respondent=s action was not arbitrary, capricious or contrary to rule or law.

### ORDER

Respondent=s action is affirmed. Complainant=s appeal is dismissed with prejudice.

DATED this \_\_\_\_ day of July, 2000, at Denver, Colorado.

Robert W. Thompson, Jr.

Administrative Law Judge
State Personnel Board
1120 Lincoln Street,
#1420
Denver, CO 80203

# **NOTICE OF APPEAL RIGHTS**

### EACH PARTY HAS THE FOLLOWING RIGHTS

1. To abide by the decision of the Administrative Law Judge ("ALJ").

2. To appeal the decision of the ALJ to the State Personnel Board ("Board"). To appeal the decision of the ALJ, a party must file a designation of record with the Board within twenty (20) calendar days of the date the decision of the ALJ is mailed to the parties. Section 24-4-105(15), C.R.S. Additionally, a written notice of appeal must be filed with the State Personnel Board within thirty (30) calendar days after the decision of the ALJ is mailed to the parties. The notice of appeal must be received by the Board no later than the thirty (30) calendar day deadline. Vendetti v. University of Southern Colorado, 793 P.2d 657 (Colo. App. 1990); Sections 24-4-105(14) and (15), C.R.S.; Rule R-8-58, 4 Code of Colo. Reg. 801. If a written notice of appeal is not received by the Board within thirty calendar days of the mailing date of the decision of the ALJ, then the decision of the ALJ automatically becomes final. Vendetti v. University of Southern Colorado, 793 P.2d 657 (Colo. App. 1990).

# PETITION FOR RECONSIDERATION

A petition for reconsideration of the decision of the ALJ may be filed within 5 calendar days after receipt of the decision of the ALJ. The petition for reconsideration must allege an oversight or misapprehension by the ALJ. The filing of a petition for reconsideration does not extend the thirty calendar day deadline, described above, for filing a notice of appeal of the decision of the ALJ.

# **RECORD ON APPEAL**

The party appealing the decision of the ALJ must pay the cost to prepare the record on appeal. The fee to prepare the record on appeal is <u>\$50.00</u> (exclusive of any transcription cost). Payment of the preparation fee may be made either by check or, in the case of a governmental entity, documentary proof that actual payment already has been made to the Board through COFRS.

Any party wishing to have a transcript made part of the record is responsible for having the transcript prepared. To be certified as part of the record, an original transcript must be prepared by a disinterested, recognized transcriber and filed with the Board within 45 days of the date of the designation of record. For additional information contact the State Personnel Board office at (303) 894-2136.

# **BRIEFS ON APPEAL**

The opening brief of the appellant must be filed with the Board and mailed to the appellee within twenty calendar days after the date the Certificate of Record of Hearing Proceedings is mailed to the parties by the Board. The answer brief of the appellee must be filed with the Board and mailed to the appellant within 10 calendar days after the appellee receives the appellant's opening brief. An original and 7 copies of each brief must be filed with the Board. A brief cannot exceed 10 pages in length unless the Board orders otherwise. Briefs must be double spaced and on 8 2 inch by 11 inch paper only. Rule R-8-64, 4 CCR 801.

# **ORAL ARGUMENT ON APPEAL**

A request for oral argument must be filed with the Board on or before the date a party's brief is due. Rule R-8-66, 4 CCR 801. Requests for oral argument are seldom granted.

### CERTIFICATE OF MAILING

This is to certify that on the \_\_\_\_ day of July, 2000, I placed true copies of the foregoing INITIAL DECISION OF THE ADMINISTRATIVE LAW JUDGE in the United States mail, postage prepaid, addressed as follows:

Rick I. Prottsman 205 South Belford Holyoke, CO 80734

and in the interagency mail, addressed as follows:

Coleman M. Connolly
Assistant Attorney General
1525 Sherman Street, 5th Floor
Denver, CO 80203